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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 281

WILLIAM H. KENNER, ESTATE OF ELEANOR V. KENNER, Deceased, and KENNER'S CHARITABLE HOSPITAL, INC. a not-for-profit, Illinois corporation, *Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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ESTATE OF ELEANOR V. KENNER, Deceased
By: WILLIAM H. KENNER

KENNER'S CHARITABLE HOSPITAL, INC.
a not-for-profit, Illinois corporation
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PETITION FOR A WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, William H. Kenner, Estate of Eleanor V. Kenner, deceased, and Kenner's Charitable Hospital, Inc., a not-for-profit, Illinois corporation, pray for a writ of certiorari to review the decision of the United States Court of Appeals For The Seventh Circuit, entered in the above entitled case on January 5, 1968.

CITATIONS TO OPINIONS BELOW

No opinion was rendered in the Tax Court, Judge Withey merely "lodged" with the Tax Court "Petition For Court To Request U. S. Attorney General To Investigate Fraud Upon The Court".

The opinion of the United States Court Of Appeals For The Seventh Circuit was reported at 387 F. 2d 689 (1968), and is printed in Appendix (1a).

The opinion in prior Tax Court case is reported as *Kenner* v. *Commissioner of Internal Revenue,* 318 F. 2d 632 (1963) and is printed in Appendix (p. 7a).

JURISDICTION

The judgment of the United States Court Of Appeals For The Seventh Circuit was entered on January 5, 1968 (App. p. 1a) 387 F. 2d 689. A timely "Petition For Rehearing", a printed copy of which is in the record here, was denied on February 14, 1968 (App. p. 7a).

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

An order extending the time to file petition for writ of certiorari to July 13, 1968, was entered by this Court on May 2, 1968.

ISSUES PRESENTED

The principal substantial issue of continuing importance by this case is whether the Internal Revenue Laws may, consistent with the Fourteenth Amendment to the Constitution of the United States, be used in a corrupt shakedown conspiracy and if so, whether the refusal to pay a $60,000 extortion demand can take the form of a confiscation of a two million dollar not-for-profit Hospital, real estate and cash.

Also presented is the question whether the "Petition For Court To Request U. S. Attorney General To Investigate Fraud Upon The Court", alleged fraud with sufficient particularity, and if not, should leave have been granted to amend, instead of dismissing it.

STATUTE INVOLVED

The issues involve the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

Section 1 of Amendment Fourteen, reads:

> * * * nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The issues also involve Rule 9(b) of 28 USC Rules of Civil Procedure, which reads:

> Rule 9. Pleading Special Matters
>
> (b) Fraud, Mistake, Condition of Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

STATEMENT

1. Importance of the Case

This matter is of great moment to the public.

This matter does not only shock, devastate and concern the immediate petitioners. There are issues of great moment to the public. Furthermore, tampering with the administration of justice in the manner shown here involves far more than an injury to a single

litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

The meaning of this case cannot be mistaken. The sense of mankind is against extortion and fraud practiced on judicial institutions. Every stage of this long, excruciating death-dealing process makes it clear that here the Court is confronted with one of the great and signal cases of court room injustice in American legal history.

This case cries out for review by this Court to the end that other individuals and Hospitals will not be subjected to bludgeons of extortion and endless years of predatory litigation as petitioners have suffered here.

The disposition now to be made of this case admits of no doubt. The records of the courts must be purged and the judgments in respondent's favor, both in the U. S. Court of Appeals and the Tax Court must be vacated and the suits by respondent must be finally dismissed. No principle is better settled than the maxim that he who comes into equity must come with clean hands and keep them clean throughout the course of the litigation, and that if he violates this rule, he must be denied all relief whatever may have been the merits of his claim. *Hazel-Atlas Glass Co.* v. *Hartford*

Empire Co. (1944), 322 U.S. 238, 250, 64 S. Ct. 997, 88 L. ed. 1250; *Root Refining Co.* v. *Universal Oil Products Co.* (CCA 3d, 1948) 169 F. 2d 514, 534-535.

2. Nature of the Case

This petition for certiorari is petitioners' last resort in their quest during many years for a remedy of their substantial Federal rights under the due process and equal protection clauses of the Fourteenth Amendment to the U.S. Constitution.

Here are questions of importance to the due administration of justice throughout the United States.

The decisions below have left petitioners helplessly enmeshed in many years of unrelenting campaign of legal harassment, oppression and devastation, as a result of a corrupt conspiracy to extort $60,000 from petitioners. Because petitioners refused to pay $60,000 extortion demand, all of petitioners' assets of over $2,000,000 were summarily confiscated and the tax-exempt status of Kenner's Charitable Hospital, Inc., a not-for-profit Illinois corporation, was revoked, forcing the Hospital to close.

A "Petition For Court To Request U. S. Attorney General To Investigate Fraud Upon The Court" was filed in the Tax Court, on September 12, 1966 (see printed "Brief and Appendix of Appellants", App., p. 3, which is part of the record herein). The Tax Court merely "lodged" the petition stating that it had "no jurisdiction to act upon it". On September 22, 1966, petitioners filed an appeal in the U.S. Court of Appeals where it was held that the Tax Court did have juricdiction to act on the petition, but at the same time

it held that the petition "fails to allege fraud upon the tax court with sufficient particularity (App. p. 1a).

Despite the fact that the Tax Court had not acted on the petition, except to "lodge" it, the Court of Appeals decided as follows:

> "The tax court's dismissal of the petition is Affirmed."

Petitioners, in their petition offered to prove specific facts which would plainly impugn the official record and they did show with particularity an unconscionable scheme designed to improperly influence the court in its decision, but the Court of Appeals held that "* * * the present petition lacks sufficient substance".

The conspirators had a hammer-lock on petitioners until about one year ago when petitioners managed to extricate themselves from that formidable control and immediately they filed in the Tax Court their "Petition For Court To Request U. S. Attorney General To Investigate Fraud Upon The Court". The conspiracy was especially vicious since it influenced and controlled petitioners' attorneys, one of which was John Potts Barnes, who at first represented to respondent and assured petitioners that no tax was owed, then later when he became part of the conspiracy and was rewarded by respondent, on June, 1955, with the position of Chief Counsel for the Internal Revenue Service he reversed himself. He remained as Chief Counsel until January 1957. In March 1956, in the middle of his tenure with the IRS, he demanded a "fee" from petitioners of about $5,200 for service up to that time, which he was paid, but petitioners at this point were not aware of Barnes' complicity in the conspiracy and that he was busy processing the tax case against them resulting

in the confiscation of all of petitioners' assets, including $78,000 cash in the bank and $2,000,000 worth of real estate leaving petitioners only debts. They picked petitioners clean and put them on their feet—bare-feet and of course left them with all of the debts. Apparently this was not yet enough because on May 21, 1965, they signed an "AGREED ORDER" for $447,985.38, without the knowledge or consent of petitioners which they now claim was a mistake, that it should have been $705,126.88! See *United States of America* v. *William H. Kenner, et al.,* United States District Court, Northern District of Illinois, Eastern Division, suit commenced in February, 1968, No. 62 C 1049. Petitioners have made repeated requests for an accounting of the unlawful confiscations of assets without success.

It is difficult to conceive a vicious extortion scheme more calculated to bind, suppress, financially and indeed physically destroy petitioners than the one which has been used and is in force against them.

SUMMARY OF ARGUMENT

This case is a brazen, unconscionable conspiracy to extort $60,000 from petitioners. Because the shakedown was unsuccessful, petitioners were relieved of all of their assets worth over $2,000,000, Kenner's Charitable Hospital, Inc., a not-for-profit Illinois corporation was forced to close, and the unbearable situation caused the untimely death of petitioner, Eleanor V. Kenner—an unconstitutional attempt under the guise of the Internal Revenue laws to confiscate property.

Such unscrupulous and ruthless misuse of judicial process has denied petitioners due process and equal protection of law under the Fourteenth Amendment.

Petitioners sufficiently particularized their allegations of fraud practiced on the court in the petition, and in holding that such was not the case, leave should have been granted to amend, but in no event should it have been dismissed, in the interest of substantial justice.

ARGUMENT

POINT I

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN CONFLICT WITH THE DECISIONS OF THIS COURT AND HAS SO FAR DEPARTED FROM THE ACCEPTED COURSE OF JUDICIAL PROCEDURE AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF REVIEW.

1. The Bludgeoning of Petitioners

This is not a case of using the Federal courts and the judicial process to collect tax actually owed, but as an instrument to bludgeon petitioners out of $2,000,000 because they would not pay a $60,000 extortion demand.

The Court of Appeals (1a) ignored the serious $60,000 shakedown incident by touching it much too lightly, as follows:

> "One agent, according to Dr. Kenner, solicited a bribe, although later investigation was said to clear the agent".

The agent was never cleared by an independent government agency. According to information which has reached petitioner, the agent was penalized for bungling the extortion attempt. The detail of respondent's own investigation is a secret in his exclusive, hostile control.

Petitioners have made demands for specifics about this incident but it remains a deep dark secret. To

protect such wrongdoing is obnoxious to the public policy of this jurisdiction.

Such misuse of judicial process is contra to due process and equal protection of the law under the Fourteenth Amendment.

2. Death and Destruction of Petitioners

George Templer who demanded the $60,000 shakedown, John Potts Barnes who was Chief Counsel for both petitioners and respondent at the same time, together with the abnegation of the Judges of their judicial functions, have put Kenner's Charitable Hospital, a not-for-profit Illinois corporation out of business; the second petitioner, Eleanor V. Kenner, could not stand up under the strain of many years of unconscionable harassment, she died; and the lone surviving petitioner, Dr. William H. Kenner, has been rendered sick and aged—all of which does violence to due process and equal protection of the law, and is a reflection on the bench and bar.

3. Sinister Machinations of Corrupt Officials Is "Standard Practice" According to Respondent

This case is so shocking and appalling, it cannot be overstated.

In "Brief For The Respondent," p. 29, filed June 5, 1967, in the Court of Appeals, respondent states that " * * * the specific acts of fraud relied upon by petitioners * * * sinister machinations of corrupt officials turn out, upon examination, to be standard practice".

Upon reading this admission, petitioners were at first nonplused and shocked. They were under the erroneous impression, in their naive belief, that theirs was one of only a few cases of fraud practiced on the court by respondent but, "upon examination", are inclined

to be compelled to broaden and rectify their thinking and realize that it is, in truth and fact, "standard practice", since then their "examination" revealed the following "standard practice", as set out in petitioners' printed "Petition for Rehearing", filed on January 19, 1968, in Court of Appeals, pp. 12-14, which is part of the record here. Taking into account the public utterances of outraged responsible government officials, who are quoted below, of which the Court will take judicial notice:

> "27. The Court will take judicial notice that Sen. Warren Magnuson (D., Wash.) declared:
>
> 'Too many Americans pay more than their share of taxes, because they are intimidated by a tax-collecting octopus which has them at a disadvantage and keeps them that way.'
>
> 28. The Court will take judicial notice that more than half the Senate membership has gone on record as calling for something to be done about the way small taxpayers are abused by IRS.
>
> 29. The Court will take judicial notice that Sen. Norris Cotton (R., N.H.) said:
>
> 'My files, like those of every other senator, are filled with moving appeals from taxpayers whose experience with IRS have turned into nightmares of inquisition.'
>
> 30. The Court will take judicial notice that alarmed by multiplying complaints, the Senate Judiciary Subcommittee on Administrative Practice and Procedure, Room 3214, New Senate Office Bldg., Wash., D. C. 20510, two years ago began asking IRS officials and their victims questions under oath; that the ensuing hearings produced astounding testimony disclosing that: IRS has defied court orders, criminally picked locks, stolen records and threatened reputable people.
>
> 31. The Court will take judicial notice that Sen. Edward V. Long (D., Mo.) chairman of the Senate

subcommittee probing into IRS practices, declared:

'IRS has become morally corrupted * * * it acts like a Gestapo preying upon defenseless citizens.'

32. The Court will take judicial notice that Senate Majority Leader Everett Dirksen, a subcommittee member, reported:

'Outraged constituents have inundated my desk with letters blistering the Revenue Service collection practices * * *'"

33. The Court will take judicial notice that the Federal District Court in Boston declared that IRS's 'unlawful pressures' against Donald R. Lord of Dedham, Mass., 31-year-old accountant, came 'close to extortion'; that it ruled the seizure of the business records completely illegal, and forbade IRS to make any further use of them; that yet, as a distinguished Boston lawyer, Lawrence O'Donnell subsequently proved with testimony of one agent who resigned in disgust, IRS made copies of these records and continued to use them—in arrogant contempt of the court order.

34. The Court will take judicial notice that Sen. John J. Williams (R., Del.) has unveiled on the floor of the Senate undisputed evidence of a double standard, which shows that while mercilessly trying to take the last cent of some taxpayers, IRS has treated others quite differently; that over a period of seven years, IRS allowed the New York-based real estate firm of Webb & Knapp to pile up tax debts of more than $27 million, while the Federal Housing Administration lavished on it $67 million in government-insured loans; that Webb & Knapp defaulted on the loans, and IRS in December 1965 wrote off a whopping $26 million as 'uncollectible'; that similarly, IRS last year simply wrote off as 'uncollectible' a tax bill of more than $23 million owed by six American shipping com-

panies controlled by Greek magnate Stavros Niarchos."

All of the foregoing practices of respondent are in violation of the due process and equal protection clauses of the Fourteenth Amendment.

4. Existing Judgments Encourage a Scourge of Other Extortions

To permit the judgment of the instant case to stand would seriously encourage and subject every Hospital as well as other institutions and individuals to a scourge of extortions involving untold millions of dollars by unscrupulous Internal Revenue Agents. No one knows how much extortion now exists. At the time the shakedown incident took place in the instant case, the Chicago District Director of Internal Revenue, Sauber, was indicted. A former Commissioner of Internal Revenue served time in the Lewisburg Penitentiary. Former Chief Counsel of Internal Revenue, Caudel, was accused of corruption. Very recently, 15 agents were indicted in the New York district for bribe solicitation.

5. Petition To Investigate Fraud Practiced on the Court Was Ignored by the Tax Court

The "Petition For Court To Request U. S. Attorney General To Investigate Fraud Upon The Court" was ignored by the Tax Court. It was only "lodged" in that court and not otherwise acted on, as stated in the Court of Appeals decision from which the following is quoted (App. p. 1a):

> "Judge Withey concluded the tax court lacked jurisdiction either to grant or deny the petition, and ordered it 'lodged' with the tax court."

The "lodging" violated due process and equal protection under the Fourteenth Amendment.

6. Court of Appeals Held Petition Is Insufficient

The Court of Appeals erroneously held that the petition "* * * fails to allege fraud upon the Tax Court with sufficient particularity."

7. Fraud on the Court Is Gross, Brazen, Notorious and Shocking

The fraud practiced on the court, particularized in the petition is gross, brazen, notorious and shocking, participated in by petitioners' own attorneys, respondent, and by the abnegation of the Judges of their judicial functions and others.

8. Shakedown Attempt for $60,000

It was stated in the Petition (see printed "Brief and Appendix For Appellants," App. 6) that the Internal Revenue Agent Templer attempted a $60,000 shakedown, by making the following demand:

> "If you give me $60,000.00, I will leave you alone."

The shakedown attempt violated due process and equal protection under the Fourteenth Amendment.

9. John Potts Barnes Acted as Chief Counsel for Both Petitioners and Respondent at the Same Time

Attorney John Potts Barnes was engaged by petitioners who assured them that they owed no tax. Thereafter Barnes was also employed as Chief Counsel for the Internal Revenue Service and there processed the case personally against petitioners (see printed "Supplemental Appendix For Petitioners," pp. 1-18, filed in Court of Appeals, a copy of which

is part of the record here). The following is quoted from page 6, of the petition:

> "When John Potts Barnes first came on the case, he wrote a letter to the Commissioner stating that Kenner Hospital was indeed a non-profit institution. While he was still in the case, he was appointed Chief Counsel for the IRS in Washington, D. C., and then he wrote a letter * * * reversing his former letter, * * *.
>
> "John Potts Barnes demanded payments on the case, even though he was at the time a Government employee. During the trial in October, 1959, Mr. Barnes was asked if he had any records regarding the Kenner case. His answer was negative. Following this short session on the stand, the Court recessed and the Judge invited Mr. Barnes into his chambers."

Barnes' representation of petitioners was a sham and a fraud practiced on the court, and a violation of due process and equal protection under the Fourteenth Amendment.

10. Tax Court Judge Mulroney Abnegates Judicial Function

Some time after Judge Mulroney recessed the court to invite Barnes into his chambers, the Judge issued a decision (*Kenner* v. *C.I.R.*, 7th Cir. 1963, 318 F. 2d 632) (App. p. 7a) which "facts" stated therein are full of holes, like those in a sieve, and which took 22 pages in the petition to briefly describe (see printed "Brief and Appendix For Appellants," App. 4-26). We submit that no one could read the petition and not be struck by the abnegation of Judge Mulroney of his judicial function to respondent. The abnegation was in derogation to the due process and equal protection of the Fourteenth Amendment.

In 7 Moore's Fed. Prac., p. 510, it is stated as follows:

> "And while less obvious, an abnegation by the judge of his judicial function, although no actual fraud was perpetrated, may well be a 'legal' fraud by him upon the judicial institution. But Hazel-Atlas goes much further. In this case the court was not corrupted; and the extent to which the concocted article influenced the court was problematical. But granted that if the concoction and use of the article constituted fraud upon the court and hence relief should be granted without a determination that the judgment was the product of this fraud * * *"

11. Fraud Practiced on Court—Barnes Gets $5.107 Sham Fee

The intimidating conduct of John Potts Barnes with Judge Mulroney combined with the Judge's open, notorious, sarcastic, crushing and intimidating attitude toward witness Dr. Kenner, even beside the fact that Barnes was Chief Counsel for both parties at the same time, demanded and was paid a $5,107.50 "fee", in the middle of his tenure with the IRS, in March 1956, for such corrupt sham services rendered—all of which constitutes fraud practiced on the court, in violation to due process and equal protection clauses of the Fourteenth Amendment.

In 7 Moore's Fed. Prac., page 510, it is also stated that:

> "One point of difference, although not stressed by the Court in Hazel-Atlas, is that an attorney of Hartford was implicated in perpetrating the fraud. We believe that this is important, for an attorney is an officer of the Court. While he should represent his client with singular loyalty that loyalty does not demand that he act dishonestly or fraudulently; on the contrary his loyalty to the court, as an officer thereof, demands integrity and honest

dealing with the court. And when he departs from that standard in the conduct of a case he perpetrates a fraud upon the court.

12. Facts Impose Upon Court Duty To Grant Petition

The foregoing facts not only justify the inquiry but impose upon the court to make it even if petitioners should not be willing to cooperate, to the end that the records of the court might be purged of fraud as was declared in *Hazel-Atlas* v. *Hartford,* 322 U.S. 238, 246, S. Ct. 997, 1001, as follows:

> "Indeed these facts not only justify the inquiry but impose upon us the duty to make it, even if no party to the original cause should be willing to cooperate, to the end that the records of the court might be purged of fraud, * * *"

When the foregoing facts and citations were brought to the attention of the Court of Appeals, it merely considered the abnegation of the judicial function of Judge "unwise". The following is quoted from the opinion:

> "* * * it was unwise for the judge to have a private conversation with Mr. Barnes under the circumstances, because of the possibility of giving rise to suspicions such as Dr. Kenner suggests. But Dr. Kenner's petition, considered either as a whole or in its several aspects, fails to allege fraud upon the tax court with sufficient particularity to entitle it to further consideration."

13. Court of Appeals Suppressed Additional Particulars of Fraud Practiced on the Court

Respondent suggested on page 35 of his "Brief For The Respondent" that petitioners supply or "reframe" their allegations of fraud which petitioners did not deem necessary; however, petitioners did move for leave

of court while at the same time submitting "Additional Affidavits Of Petitioners", containing the following pertinent and material affidavits, which unopposed motion was summarily denied without a hearing:

> Attorney Cass Practiced Fraud On The Court
>
> Abnegation Of The Trial Judge Of His Judicial Function
>
> "Attorney" Houston Practiced Fraud On The Court
>
> Attorney John Potts Barnes Practiced Fraud On The Court
>
> Solicitation Of $60,000 Bribe By Agent Templer In Lieu of $2,078,000 "Tax"

Petitioners have filed one printed copy of the foregoing mentioned, "Additional Affidavits Of Petitioners" as part of the record herein, which document was not certified by the Court of Appeals since it was "received" but not considered "filed".

The said unopposed motion was denied as follows:

> "On consideration of the motion of petitioner William H. Kenner, acting pro se, for leave to file additional affidavits, opposing counsel having filed no objections thereto,
>
> IT IS HEREBY ORDERED that the said motion for leave to file additional affidavits be, and the same is hereby denied."

The exclusion of the "Additional Affidavits of Petitioners" denied petitioners due process and equal protection guaranteed by the Fourteenth Amendment to the U. S. Constitution.

14. Suppression by Court of Appeals of Evidence of Fraud Is in Itself "Legal" Fraud on Court

The denial by the Court of Appeals to admit the additional affidavits was an abnegation of its judicial function and of itself "legal" fraud practiced upon the court, in direct violation of the decision of this Supreme Court, as quoted from *Hazel-Atlas, supra.*

15. Other Suppressed Evidence of Fraud Is in Hostile Exclusive Control of Respondent

In this case there are many more suppressed facts of fraud shrouded in secrecy. All efforts to unearth them have met with strong opposition, except as stated above in regard to the additional affidavits. Justice Brandeis correctly observed: "Sunlight is the most powerful of all disenfectants." Most of the corruption is still hidden below the surface.

Petitioners have shown injustice and fraud resulted from the attorneys who are officers of the courts and others. The Court should therefore not hesitate, much less hinder or suppress bringing respondent to his defense, as declared in *Chicago Title & Trust Co.* v. *Fox Theatres Corp.*, 182 F. Supp. 18 (SDNY), as follows:

> "This court will not shrink from putting respondents to their defense if it is shown that injustice or fraud resulted from the corruption of its officers."

16. Fraud on the Courts Should Not Be Condoned

Fraud upon the courts should not be condoned in the instant case.

The Court in *Hazel-Atlas, supra,* said:

> "But even if Hazel did not exercise the highest degree of diligence Hartford's fraud cannot be condoned."

17. Judgments Should Be Set Aside Irrespective of Merits of Claim

Where fraud upon the court is established, as here, the judgment should be vacated, irrespective of the merits of the claim, as decided in *Hazel-Atlas, supra,* quoted as follows:

> "Where fraud upon the court is established . . . His judgment should be set aside and his claim dismissed, irrespective of the merits of his claim."

The judgment denies petitioners due process and equal protection under the Fourteenth Amendment.

POINT II

PETITION SHOULD NOT HAVE BEEN DISMISSED. IF FOUND INSUFFICIENT, LEAVE SHOULD HAVE BEEN GRANTED TO AMEND. DISMISSAL VIOLATED DUE PROCESS AND EQUAL PROTECTING CLAUSES OF THE FOURTEENTH AMENDMENT TO CONSTITUTION OF THE U. S.

1. Petitioners Sufficiently Particularized Fraud Practiced on the Court

Petitioners have fully complied with Rule 9 (b) of the Fed. Rules of Civ. Proc. in that they have described, not only the particular fraud, but also the circumstances constituting fraud upon the courts with particularity. In *Noland Bros., Inc.* v. *U. S. for use of Fox Bros.,* 266 Fed. 2d 143, citing Rule 9 (b), it is stated on page 143, as follows:

> "* * * and Federal Rule does not require express allegation of 'fraud' but, instead, merely requires

> that the circumstances constituting fraud shall be pleaded with particularity. Fed. Rules Civ. Proc. rule 9 (b) 28 USCA."

Again, in *U. S.* v. *Gill,* D.C. Pa. (1957), 156 F. Supp. 955, it is stated:

> "* * * but all that is required is that the circumstances constituting the alleged fraud be pleaded with sufficient definiteness to advise the adversary of the claim which he must meet."

The dismissal denied petitioners due process and equal protection under the Fourteenth Amendment.

2. Even If Petition Is Insufficient It Should Be Amended, Not Dismissed

Even if allegations of fraud offended Rule 9(b) of the Fed. Rules of Civ. Proc., the pleading should be amended, not stricken or dismissed. In *Simmonds Aerocessories, Ltd.* v. *Elastic Stop Nut Corp.,* D.C.N.J. (1957), 154 F. Supp. 615, it was held that, "leave would be granted to amend". Respondent, in his "Brief For Respondent", suggested that, " * * * petitioners reframe their allegations of fraud * * * there is precedent for such action. *Chicago Title & Trust Co.* v. *Fox Theatres Corp.,* 182 F. Supp. 18 (S.D.N.Y.)." Petitioners were of the opinion that their petition was more than sufficient, but they did make an effort to file additional affidavits showing fraud, as stated above. The dismissal of the petition without permitting petitioners to amend violated the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the U. S.

CONCLUSION

For each of the reasons heretofore assigned, petitioners respectfully submit that the judgment must be reversed.

Respectfully submitted,

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